

VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

2015 MAY 26 P 1:35

**STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT**

**STATE OF VERMONT,
Plaintiff**

v.

**FLORISTS' TRANSWORLD
DELIVERY, INC.**

and

FTD.COM INC.

Defendants

**CIVIL DIVISION
Docket No.**

FILED

FINAL JUDGMENT AND CONSENT DECREE

Plaintiff, the State of Vermont ("Plaintiff") has filed a Complaint for a permanent injunction and other relief in this matter pursuant to the Vermont Consumer Protection Act, 9 V.S.A. chapter 63 alleging the Defendants Florists' Transworld Delivery, Inc. and its wholly-owned subsidiary FTD.COM Inc. (hereinafter collectively referred to as "Defendants"), committed violations of the Consumer Protection Act in the offer and/or sale of consumer goods and consumer services.

Plaintiff, by its counsel, and the Defendants, by their counsel, have agreed to the entry of this Final Judgment and Consent Decree ("Consent Decree") by this Court without trial or adjudication of any issue of fact or law, and without admission of any wrongdoing or admission of any of the violations of the Consumer Protection Act or any other law as alleged by Plaintiff.

Plaintiff has brought this action to conclude a multi-state investigation of the Defendants conducted by the Attorneys General of Alabama, Alaska, Delaware, Florida, Idaho, Illinois, Kansas, Maryland, Maine, Michigan, Nebraska, New Jersey, New Mexico, North Dakota, Ohio,

Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington and Wisconsin (hereinafter collectively referred to as the "Attorneys General"). Contemporaneous with this Consent Decree, the Defendants are entering into similar agreements with each of the Attorneys General of the States.

PARTIES

1. Plaintiff is the State of Vermont. The Vermont Attorney General is authorized under the Consumer Protection Act, 9 V.S.A. § 2458(b), to sue to enforce the Act's prohibitions on unfair and deceptive acts and practices in commerce.

2. Defendant Florists' Transworld Delivery, Inc. is a Michigan corporation located at 3113 Woodcreek Drive, Downers Grove, Illinois 60515 that offers and sells flowers and other gifts through its subsidiary Defendant FTD.COM Inc. at the www.ftd.com website that is available to Vermont consumers.

DEFINITIONS

3. **"Account Information"** means any information, encrypted or not, that would enable the Defendants, or a third party acting on the Defendants' behalf, to cause a charge to be placed against a consumer's account, whether credit, debit, or any other kind of account or method of billing. Account Information includes, but is not limited to, any credit or debit card account numbers, credit or debit card type, expiration date, security code and other information or data used strictly for the purpose of billing a Consumer.

4. **"Clearly and Conspicuously"** and **"Clear and Conspicuous,"** when referring to a statement or disclosure, shall mean that such statement or disclosure is disclosed in such size, color, contrast, location, duration, and audibility that it is readily noticeable, readable, understandable, and capable of being heard. A statement may not contradict or be inconsistent

with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, in a manner that is likely to be noticed, readable, and understandable, and it must not be obscured in any manner. Audio disclosure shall be delivered in a volume and cadence sufficient for a consumer to hear and comprehend it. Visual disclosure shall be of a size and shade and appear on the screen for a duration sufficient for a consumer to read and comprehend it. In a print advertisement or promotional material, including, but without limitation, point of sale display or brochure materials directed to consumers, the disclosures shall be in a type size and location sufficiently noticeable for a consumer to read and comprehend it, in a print that contrasts with the background against which it appears.

5. **“Consumer”** shall have the same meaning as that term is defined in the Consumer Protection Act identified in this Consent Decree.

6. **“Consumer Protection Act”** shall be the Vermont Consumer Protection Act, 9 V.S.A. chapter 63 and any future amendments thereto.

7. **“Effective Date”** shall mean the date on which this Consent Decree is entered by the Court.

8. **“Free-to-Pay Conversion”** means an offer or agreement to sell or provide any goods or services to a Consumer for a free trial period after which the Consumer will be billed a fee if the Consumer does not reject the offer or cancel the agreement.

9. **“Marketing Partner(s)”** means any person or entity that the Defendants have authorized to offer, promote, advertise or sell any Membership Program to the Defendants’ Consumer customers.

10. **“Membership Program(s)”** means any program, product, or service offered by a third party that includes recurring charges following a Free-to-Pay Conversion; provided, however, as used in this Consent Decree, a “Membership Program” shall not include, without limitation, a program, product, or service marketed through a banner ad.

11. **“Personal Information”** means an individual’s first name or first initial and last name in combination with the individual’s billing address, Social Security number, driver’s license number, financial or credit account numbers or Individual Taxpayer Identification number. For purposes of this Consent Decree, Personal Information shall include Account Information.

PLAINTIFF’S ALLEGATIONS

12. The Defendants engage and have engaged in the business of offering and selling consumer goods and consumer services to Vermont Consumers via the Internet through websites controlled by the Defendants.

13. Between 2005 and 2010, the Defendants entered into a number of post-transaction marketing agreements (hereinafter “marketing agreement(s)”) with Marketing Partner, Webloyalty, Inc.

14. Pursuant to the Defendants’ marketing agreements with their Marketing Partner referenced in the previous paragraph, the Defendants agreed to display advertisements for Membership Programs on the Defendants’ website. Some of the advertisements were published to Consumers in the course of their transactions with the Defendants. In most cases, the advertisements were published immediately following the Consumers’ transactions with the Defendants.

15. The Defendants earned revenue from these marketing agreements based on the number of Marketing Partner offers viewed by Consumers on the Defendants' website, commonly referred to in the marketing agreements as "impressions," and/or the number of times a Consumer accepted a Marketing Partner's offer, commonly referred to in the marketing agreements as a "conversion."

16. The advertisements offered various Membership Programs, such as discount clubs, travel rewards programs, and insurance-type products. These Membership Programs typically offered an initial free-trial period, with a Free-to-Pay Conversion that resulted in a large number of Consumers complaining to the Attorneys General that they were unwittingly billed for Membership Programs until they cancelled the Membership Programs.

17. In some instances, the advertisements were presented to Consumers with the Defendants' logo while they were in the process of completing their transactions with the Defendants. This gave some Consumers the impression that they were still conducting business with Defendants (as opposed to the Defendants' Marketing Partner). The advertisements failed to adequately identify the Marketing Partner as the business making the offer. Consequently, some Consumers were not aware that the offer was coming from the Defendants' Marketing Partner and not from the Defendants.

18. In some instances, Consumers were encouraged to respond to the Marketing Partner's offers by clicking a "Continue" or "Yes" button in order to claim a discount or cash back reward on the Consumer's purchase with the Defendants or some other retailer, making the advertisement appear as if it were presented by the Defendants instead of a Marketing Partner. The Defendants did not adequately inform Consumers that by clicking on these buttons, they were being directed to an entirely different website hosted by a Marketing Partner.

19. In other instances, Consumers needed only to enter their email addresses or check a box in order to accept the Marketing Partner's offer, unaware due to inadequate disclosure that, by doing so, they were agreeing to enroll in a Membership Program.

20. Defendants had authority, pursuant to their marketing agreements with their Marketing Partner, to review, revise and/or refuse to display any Marketing Partner's offer or advertisement.

21. As a result of the above-described practices, some Consumers who enrolled in Membership Programs did so without knowing they were agreeing to enroll in a Membership Program that would cost them money they did not intend to spend. Many Consumers never availed themselves of the Membership Programs' purported benefits.

22. In order to facilitate the Marketing Partner's billing practices, the Defendants, without adequately obtaining permission from Consumers, electronically passed Consumers' credit or debit card account information to their Marketing Partner when the Consumers enrolled in a Membership Program.

23. The Defendants' privacy policies were misleading, inconsistent or failed to adequately inform Consumers that the Defendants shared Consumers' Personal Information with third parties, including Defendants' Marketing Partner, when Consumers enrolled in a Membership Program.

DEFENDANTS' DENIALS

24. The Defendants deny any and all allegations made by Plaintiff that they have engaged in wrongdoing of any kind. The Defendants are confident that if any of the alleged misconduct were to be litigated, the Defendants would prevail on each and every claim asserted by the Plaintiff. However, to avoid the substantial burden and expense on the Defendants that

would result from continued investigation into these issues or litigation, the Defendants have elected to resolve this matter through a consensual resolution. More specifically, the Defendants make the following denials:

25. With respect to Membership Programs offered to Defendants' customers by its former Marketing Partner, the Defendants sought to ensure that Membership Program offers made to Consumers complied with governing law by adopting a three-tier approach: (a) negotiation of contractual terms that required the Marketing Partner to make clear and conspicuous disclosures in the Membership Program offers; (b) review of the Membership Program offers to ensure that the disclosures were clear and conspicuous; and (c) follow-up on Consumer complaints received by the Defendants to ensure that the Marketing Partner provided appropriate refunds to a dissatisfied customer. As a result of this three-tier approach, the Membership Program offers made to Consumers were clear and conspicuous as a matter of law, in that they clearly delineated the party making the offer, described all of the salient terms and conditions of the offer, and obtained acceptance of the offer from customers with unambiguous language located in immediate proximity to the "Yes" or similar button that the action of clicking the button authorized the Defendants to provide certain Personal Information to the Marketing Partner in order to complete their transaction. Under no circumstances did the Defendants ever share a Consumer's Personal Information with a third party without first receiving that Consumer's informed consent. In addition to these clear and conspicuous disclosures, the Defendants' Marketing Partner reminded Consumers via e-mail, prior to being charged, that they would soon be charged for their participation in the Membership Programs and provided dissatisfied consumers with refunds. As of January 2010, the Defendants had voluntarily terminated their contract with their Marketing Partner.

APPLICATION

26. The provisions of this Consent Decree apply to the Defendants and their agents, successors, assignees, merged or acquired entities, controlled affiliates, controlled subsidiaries or divisions, and parent or controlling entities, over which the Plaintiff has jurisdiction.

27. The provisions of this Consent Decree shall apply to the Defendants in connection with the offer and/or sale of Membership Programs to Vermont Consumers; provided, however, that in the case of the offer and/or sale of Membership Programs, the provisions of this Consent Decree shall only apply when a Membership Program is marketed during or immediately following the Consumer's transaction with the Defendants.

INJUNCTION

28. The Defendants shall not engage in any act or practice in violation of the Consumer Protection Act in connection with any offer of any Membership Program.

29. The Defendants shall not engage in any act or practice that violates the Restore Online Shoppers' Confidence Act, 15 U.S.C. §8401, *et seq.*

30. The Defendants shall not make any express or implied misrepresentations that have the capacity, tendency or effect of deceiving or misleading Consumers in connection with the offer or sale of any Membership Program.

31. The Defendants shall not transfer Consumers' Personal Information to any third party unless it is lawful to do so, and, prior to obtaining the Consumers' Personal Information, the Defendants Clearly and Conspicuously disclose their privacy practices and/or policies, including whether and to what extent the Defendants share Consumers' Personal Information

with third parties. Nothing contained in this paragraph shall alter or modify the requirements of paragraph 36.

32. The Defendants shall not make any false, misleading, deceptive, or conflicting statements to Consumers regarding Defendants' privacy practices and/or policies. The Defendants shall ensure any privacy policy displayed, or otherwise made available, to Consumers on their website is consistent with the Defendants' practices regarding their handling of Consumers' Personal Information.

33. The Defendants shall not use the phrase "risk-free" in connection with any Membership Program that has, in effect, a negative option requiring the Consumer to opt-out or cancel the service in order not to be billed or charged for any Membership Program.

34. The Defendants shall comply with the Federal Trade Commission ("FTC") Guide Concerning Use of the Word "Free" and Similar Representations, 16 C.F.R. § 251.1 and any amendments thereto in connection with the offer of any Membership Program.

35. The Defendants shall not misrepresent the reason or purpose for which a Consumer is receiving any offer or advertisement for a Membership Program.

36. The Defendants shall not transfer, release or otherwise share Consumers' Account Information to a Marketing Partner unless it is lawful to do so.

37. The Defendants shall not misrepresent their relationship with any Marketing Partner.

38. The Defendants shall not allow any Marketing Partner to include any of the Defendants' corporate or trade names or logos in any advertisement or offer for a Membership Program in a manner that misrepresents or obscures the identity of either the Defendants or the

Marketing Partner offering the Membership Program including, but not limited to, the use of any of the Defendants' corporate or trade name or logo in the title of a Membership Program.

39. The Defendants shall not permit their Marketing Partners to offer any goods or services to the Defendants' Consumers until after Consumers have completed their transactions with the Defendants, including (i) the Consumer's acceptance of all charges for the goods and/or services purchased from the Defendants and (ii) the presentation, if any, by the Defendants to the Consumer of a confirmation page with respect to the order immediately following the Consumer's transaction with the Defendants.

40. The Defendants shall, when directing a Consumer from one of their websites to any website operated by a Marketing Partner, Clearly and Conspicuously disclose, in a manner that is separate and apart from the Consumer's transaction with the Defendants: (i) the Consumer is leaving the Defendants' website; (ii) the Consumer is about to enter the unaffiliated Marketing Partner's website for the purpose of receiving an offer from the Marketing Partner; and (iii) the Consumer is advised to read the Marketing Partner's Terms of Service and Privacy Policy. In addition, the Consumer will be required to take some affirmative action to acknowledge and proceed past the disclosures required by this paragraph, for example by clicking an "OK" button.

41. The Defendants shall include in all contracts with their Marketing Partners a requirement that the Marketing Partners represent that they are in compliance with all applicable laws and regulations relating to the offer of Membership Programs, including the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. §8401, *et seq.*

42. The Defendants shall not misrepresent the reason for requesting a Consumer's Account Information.

43. The Defendants shall include in all contracts with their Marketing Partners the requirement that the Marketing Partners Clearly and Conspicuously disclose to the Consumer the material terms and conditions of any Membership Program prior to the Consumer agreeing to enroll in any Membership Program.

44. The Defendants shall include in all contracts with their Marketing Partners a clause permitting the Defendants to terminate their relationship with a Marketing Partner that offers or sells a Membership Program in a manner that fails to comply with ROSCA, any other applicable law or regulation relating to the offer of Membership Programs, or the Marketing Partner's contractual obligations under paragraph 43 of this Consent Decree.

45. In the event that the Defendants receive a request to cancel a Membership Program from a Consumer, or on a Consumer's behalf, the Defendants shall: (i) promptly transmit to their Marketing Partners the Consumer's cancellation request; and (ii) provide the cancelling Consumer with the name of the Marketing Partner offering the Membership Program, including the Marketing Partner's mailing address, e-mail address, toll-free telephone number, and web address, if available.

46. The Defendants shall promptly request their Marketing Partners to give prompt and full refunds to any Consumer upon request by the Consumer, or upon receipt of any complaint, if the Consumer indicates he/she did not consent to enrollment in a Membership Program or otherwise did not accept the Membership Program offer, regardless of whether the Defendants receive the Consumer's request or complaint directly from the Consumer or from an Attorney General, another government agency, or the Better Business Bureau.

PAYMENT TO THE ATTORNEYS GENERAL

47. Within thirty (30) days of the Effective Date, the Defendants shall collectively pay Two Million Eight Hundred Twenty-Two Thousand Four Hundred Dollars (\$2,822,400) in the aggregate to the Attorneys General, to be distributed among the states as agreed by the Attorneys General. Plaintiff acknowledges that this payment does not constitute a fine or penalty. The money received by the Vermont Attorney General's Office pursuant to this paragraph may be used, in accordance with Vermont law, to reimburse the Vermont Attorney General's Office for costs incurred during the investigation of this matter, for consumer education or other consumer protection purposes, and/or for any other use permitted by state law, pursuant to the Constitution of the State of Vermont, Ch.II § 27, and 32 V.S.A. § 462.

RELEASE

48. Following full payment of the amounts due under this Consent Decree, the Plaintiff shall release and discharge the Defendants from all civil claims, causes of action, damages, restitution, fines, costs, attorneys' fees, and penalties that the Plaintiff could have brought under the Consumer Protection Act or any other statutory or common law claims concerning unfair, deceptive or fraudulent trade practices based on the Defendants' conduct prior to the date of the entry of this Consent Decree, as alleged in paragraphs 12 through 23 herein, but expressly excluding any and all such claims relating to the Defendants' use of banner ads on their websites. Nothing contained in this paragraph shall be construed to limit the ability of the Plaintiff to enforce the obligations that the Defendants have under this Consent Decree. Nothing in this Consent Decree shall be construed to create, waive or limit any private right of action. This Consent Decree shall not be construed or used as a waiver or any limitation of any defense otherwise available to the Defendants in any pending or future legal or administrative action or proceeding relating to the Defendants' conduct prior to the Effective Date or of the Defendants'

right to defend themselves from, or make any arguments in, any individual or class claims or suits relating to the existence, subject matter, or terms of this Consent Decree.

49. Notwithstanding any term of this Consent Decree, any and all of the following forms of liability are specifically reserved and excluded from the release in paragraph 48 as to any entity or person, including the Defendants:

(a) Any criminal liability that any person or entity, including the Defendants, have or may have to the State of Vermont.

(b) Any civil or administrative liability that any person or entity, including the Defendants, have or may have to the State of Vermont under any statute, regulation or rule not covered by the release in paragraph 48 above, including but not limited to, any and all of the following claims:

- (i) State or federal antitrust violations;
- (ii) State or federal securities violations; or
- (iii) State or federal tax claims.

COMPLIANCE MONITORING

50. No later than thirty (30) days after the Effective Date, the Defendants shall implement the following program of internal monitoring to ensure compliance with this Consent Decree:

(a) For a period of not less than three (3) years from the Effective Date, the Defendants shall make a record of and retain all Consumer complaints brought to the Defendants' attention regarding any Membership Program offered on the Defendants' website, or in connection with a visit to the Defendants' website, along with information from a Consumer, if any, which indicates that the Consumer did not consent to

enrollment in a Membership Program;

(b) For a period of not less than three (3) years from the Effective Date, the Defendants shall retain a representative copy of each type of solicitation for a Membership Program offered on the Defendants' website or in connection with a visit to the Defendants' website;

(c) For a period of three (3) years from the Effective Date, upon reasonable prior written notice, the Plaintiff shall be permitted to inspect and copy all records as may be reasonably necessary to determine whether the Defendants are in compliance with this Consent Decree. This provision shall not be construed as limiting or restricting in any way the Plaintiff's right to obtain information, documents or testimony from the Defendants pursuant to any state or federal law, regulation or rule; and

(d) Annually, for a period of not less than three (3) years from the Effective Date, (i) if the Defendants present solicitations for Membership Programs on their website, or in connection with a visit to the Defendants' website, the Defendants shall cause all of their vice presidents or higher corporate officers who have direct responsibility for the Defendants' contact with Consumers to review a copy of this Consent Decree; and (ii) the Defendants also shall provide a copy of this Consent Decree to all of their vice presidents or higher corporate officers who have direct responsibility for the Defendants' contact with Consumers within thirty (30) days of hiring such officer.

DUTY TO COOPERATE

51. In connection with any investigation of any Marketing Partner of the Defendants, including but not limited to, Webloyalty, Inc., the Defendants shall cooperate in good faith with Plaintiff and appear at such places and times as Plaintiff shall reasonably request, after written

notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by the Plaintiff.

GENERAL PROVISIONS

52. The Defendants shall not cause or encourage third parties, nor knowingly permit third parties acting on their behalf, to engage in practices from which the Defendants are prohibited by this Consent Decree.

53. The Defendants shall not enter into, continue, or renew any contract or relationship with any Marketing Partner for the purpose of marketing a Membership Program if the contract or relationship would result in the Defendants violating the terms of this Consent Decree.

54. This Consent Decree represents the full and complete terms of the settlement entered by the parties hereto. In any action undertaken by the parties, neither prior versions of this Consent Decree nor prior versions of any of its terms that were not entered by the Court in this Consent Decree may be introduced for any purpose whatsoever.

55. All parties participated in the drafting of this Consent Decree.

56. This Court retains jurisdiction of this Consent Decree and the parties hereto for the purpose of enforcing and modifying this Consent Decree and for the purpose of granting such additional relief as may be necessary and appropriate. No modification of the terms of this Consent Decree shall be valid or binding unless made in writing, signed by the parties, and approved by this Court, and then only to the extent specifically set forth in this Court's Order. The parties may agree in writing, through their counsel, to an extension of any time period in this Consent Decree without a court order.

57. This Consent Decree may be executed in counterparts, and a facsimile or .pdf signature shall be deemed to be, and shall have the same force and effect, as an original signature.

58. All Notices under this Consent Decree shall be provided to the following address via Electronic and/or Overnight Mail, unless a different address is specified in writing by the party changing such address:

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For the Plaintiff

Scott Levin
Executive Vice President and General Counsel
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Phone: (630) 724-6729
Fax: (630) 719-7800
E-mail: legalftd@ftdi.com
For the Defendants

59. Any failure by any party to this Consent Decree to insist upon the strict performance by any other Party of any of the provisions of this Consent Decree shall not be deemed a waiver of any of the provisions of this Consent Decree, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Consent Decree. For the Plaintiff, this shall be without prejudice to the imposition of any applicable remedies, including but not limited to

contempt, civil penalties as set forth in the Consumer Protection Act and/or the payment of attorneys' fees to the Plaintiff, and any other remedies under applicable state law.

60. If any clause, provision or section of this Consent Decree other than paragraph 48 shall, for any reason, be held illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect any other clause, provision or section of this Consent Decree and this Consent Decree shall be construed and enforced as if such illegal, invalid or unenforceable clause, section or other provision had not been contained herein.

61. Nothing in this Consent Decree shall be construed as relieving the Defendants of the obligation to comply with all state and federal laws, regulations or rules, nor shall any of the provisions of this Consent Decree be deemed to be permission to engage in any acts or practices prohibited by such laws, regulations, or rules.

62. The parties understand and agree that this Consent Decree shall not be construed as an approval of or sanction by the Plaintiff of the Defendants' business practices, and the Defendants shall not represent otherwise. The parties further understand and agree that any failure by the Plaintiff to take any action in response to any information submitted pursuant to the Consent Decree shall not be construed as an approval, or sanction, of any representations, acts or practices indicated by such information, nor shall it preclude action thereon at a later date.

63. The Defendants shall deliver a copy of this Consent Decree to, or otherwise apprise, their executive management having decision-making authority with respect to the subject matter of this Consent Decree within fourteen (14) days of the Effective Date.

64. The Defendants shall not participate, directly or indirectly, in any activity or form a separate entity or corporation for the purpose of engaging in acts or practices in whole or in part in the State of Vermont which are prohibited in this Consent Decree or for any other purpose

which would otherwise circumvent any part of this Consent Decree or the spirit or purposes of this Consent Decree.

65. If the Plaintiff determines that the Defendants made any material misrepresentation or omission relevant to the resolution of this investigation, the Plaintiff retains the right to seek modification of this Consent Decree.

66. All court costs are to be paid by the Defendants.

67. The Defendants may petition the Court for modification on thirty (30) days' notice to the Plaintiff. Modification may be appropriate if the underlying facts and circumstances have changed in any material respect. In addition, the parties by stipulation may agree to a modification of this Consent Decree, which stipulation shall be presented to this Court for consideration; provided that the parties may jointly agree to a modification only by a written instrument signed by or on behalf of both the Defendants and the Plaintiff. If the Defendants seek a stipulation for a modification of this Consent Decree, they shall send a written request to the Plaintiff at least thirty (30) days prior to filing a motion with the Court for such modification. The Plaintiff shall respond to the request for modification within thirty (30) days of receipt of the request.

IT IS SO ORDERED, ADJUDGED, AND DECREED.


JUDGE

FOR THE STATE OF VERMONT

WILLIAM H. SORRELL

Attorney General

By:

A handwritten signature in dark ink, appearing to read "James Layman", is written over a horizontal line.

James Layman

Assistant Attorney General

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FOR FLORISTS' TRANSWORLD DELIVERY, INC. AND FTD.COM INC.

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